IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
January 7, 2010 Session

CONSTRUCTION CRANE AND TRACTOR, INC. v. WIRTGEN AMERICA, INC.

Appeal from the Chancery Court for Davidson County
No. 07-2151-I Claudia Bonnyman, Chancellor

No. M2009-01131-COA-R3-CV - Filed March 24, 2010

Distributor of road construction equipment sought an injunction and declaratory judgment against the manufacturer of such equipment following the manufacturer's termination of its sales and service agreement with the distributor without cause in accordance with the terms of the agreement. Distributor asserted that such termination violated the Tennessee Dealer Protection Act, Tenn. Code Ann. § 47-25-1301 *et seq*. The trial court found that the statutory provision prohibiting manufacturers from terminating a dealer's relationship with the manufacturer without cause was inapplicable to the parties because the operative agreement between the parties pre-dated the 1999 amendments to the Tennessee Dealer Protection Act prohibiting such terminations. Distributor appeals. Finding no error, we affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed

RICHARD H. DINKINS, J., delivered the opinion of the court, in which PATRICIA J. COTTRELL, P.J., M.S., and ANDY D. BENNETT, J., joined.

Charles W. Cook, III, Nashville, Tennessee, Jeffrey C. Smith and Emily C. Taube, Memphis, Tennessee, for the appellant, Construction Crane and Tractor, Inc.

Todd E. Panther, Nashville, Tennessee, for the appellant, Wirtgen America, Inc.

OPINION

The Appellee, Wirtgen America, Inc. ("Wirtgen"), is the North American subsidiary of Wirtgen GmbH, a manufacturer of road milling, asphalt paving and compaction machinery. Wirtgen's headquarters is located in Nashville, Tennessee. The Appellant,

Construction Crane and Tractor, Inc. ("CC&T"), was one of Wirtgen's distributors in various counties in the states of New Jersey, Delaware and Pennsylvania from 1986 to 2007.[1]

The parties first memorialized their relationship in 1988, when they signed a Consignment Agreement, authorizing CC&T to be a dealer of Wirtgen's milling machines and parts. The contract provided that CC&T would act as an independent retailer of Wirtgen products by buying Wirtgen products and parts to resell; the contract also permitted CC&T to receive some Wirtgen products on consignment for demonstration, lease, or rental purposes. The agreement, which had no expiration date but could be terminated by either party at any time after 90 days notice, also required CC&T to provide service and maintenance for Wirtgen products. The agreement did not define any particular territory in which CC&T was to operate.

This agreement was followed by a Sales and Service Agreement signed by the parties in 1990, which granted CC&T a nonexclusive franchise to sell and service Wirtgen milling machines in specific geographic territories including the state of Delaware and certain portions of eight counties in eastern Pennsylvania and nine counties in central and southern New Jersey. The agreement provided that Wirtgen could provide consigned machines for demonstration but otherwise CC&T was to buy machines from Wirtgen and then resell them. Like the 1988 agreement, it contained no expiration date but could be canceled by either party upon 90 days notice. The agreement also made arrangements for repurchase of items upon termination.

In 1992, the parties signed a Nonexclusive Distributor Agreement authorizing CC&T to sell Wirtgen milling machines and parts. As in the previous two contracts, some consignment for demonstrations to potential customers was allowed under the agreement; however, CC&T was to otherwise buy the equipment and parts from Wirtgen and resell the machines as well as provide service for them. Wirtgen agreed not to appoint another distributor for any part of the assigned territory so long as CC&T was not in default;[2] the assigned territory was the same as in the 1990 agreement except there was some territorial limitation in Delaware. Like the previous agreements, there was no expiration date and either party was permitted to terminate the agreement at any time with or without cause upon 90 days prior notice. The agreement also provided that "[n]o waiver, alteration or

[1] While Wirtgen notified CC&T of its intent to terminate CC&T as an authorized Wirtgen distributor on October 18, 2007, CC&T continues to be an authorized distributor of Wirtgen products as a result of an injunction ordered by the trial court following CC&T's motion requesting such.

[2] The 1992 Agreement provided that CC&T would be in default under the Agreement "[i]f any of Buyer's obligations to WIRTGEN be not paid promptly when due...."

modification of this [agreement] or any portion thereof, shall be valid unless executed in writing by both WIRTGEN and the DISTRIBUTOR."

In each instance where the parties signed a new agreement, Wirtgen sent an unsigned copy of the proposed contract to CC&T for review. CC&T signed first and then returned a signed copy to Wirtgen. Wirtgen signed each agreement last. In fact, the 1992 Agreement specifically provided, "This Agreement shall not be binding upon WIRTGEN unless and until accepted in Nashville for WIRTGEN by the authorized officer indicated below." The 1992 Agreement was the last written agreement signed by both parties.

In December 2000, CC&T submitted a proposal to Wirtgen to allow it to sell Wirtgen milling machines in Northern New Jersey. Wirtgen President, Stuart Murray, responded by letter explaining that Wirtgen had reservations about CC&T's ability to expand into the Northern New Jersey territory; consequently, in the letter he established several criteria that needed to be met before Wirtgen would consider amending CC&T's contractual territory to include the counties in Northern New Jersey. These criteria included establishing a permanent sales and service center in Northern New Jersey that met Wirtgen's standards and employing several full-time, fully-trained staff. CC&T subsequently established a sales and service center in Piscataway, New Jersey; however, according to the testimony of Mr. Murray, this facility never met Wirtgen's standards and the record does not show further discussion between CC&T and Wirtgen with respect to adding Northern New Jersey to CC&T's contractual sales and service territory.

Around the same time that CC&T asked Wirtgen to expand its territory, Wirtgen's parent company acquired two other manufacturers of road construction equipment - Hamm, a manufacturer of soil compaction equipment, and Vogele, a manufacturer of asphalt paving equipment.[3] The acquisition of these companies caused Wirtgen to determine the best way to distribute all three products lines in North America. Consequently, Wirtgen began to evaluate its existing distributors based on their ability to sell all three product lines. In 2001 and 2002, Wirtgen identified distributors that it wanted to authorize to sell all three product lines and began signing new agreements with these "Three Amigos Dealers," as Wirtgen called them.

Some time during 2001, CC&T asked Wirtgen to be allowed to sell the additional product lines. According to the testimony of Mr. Murray, Wirtgen expressed reservations, but allowed CC&T to try to sell the products at its own risk. CC&T subsequently began purchasing and reselling or renting Hamm and Vogele products. Wirtgen provided some

[3] These acquisitions began in 1999, but Wirtgen did not begin to integrate the products into its distribution system until around 2001.

sales and advertising support to CC&T with respect to these products and Wirtgen listed CC&T as a "Three Amigos Dealer" in its 2003 dealer directory.

In February 2002, Wirtgen Senior Vice President Richard Enners sent the President of CC&T, Mike Chenet, a draft of a new Wirtgen distributor sales and service agreement.[4] The draft agreement, which was neither dated nor signed by Wirtgen, was accompanied by a cover letter stating:

> In a discussion with Stu [Murray] last week he thought we should get some of the formalities out of the way by signing a new contract which includes milling machines, pavers, and compaction equipment.
> As such I have enclosed our standard contract for your review. It includes the territories of the State of Delaware, eight counties surrounding the Philadelphia area, and eleven counties in central and southern New Jersey.
> Please advise any questions you might have.

There was no subsequent discussion of the agreement between the parties and neither party signed it at that time.[5]

Shortly thereafter, in April 2002, Wirtgen notified CC&T by letter that Wirtgen had an outstanding receivable of $1.3 million due from CC&T and demanded payment of at least $150,000. The letter cited two provisions from the 1992 Agreement relating to late charges and default and explained that, while Wirtgen had never charged CC&T interest on late payments, it would consider doing so in the future; Wirtgen reserved its rights under the contract. In response to the letter CC&T made an effort to pay the money owed to Wirtgen, but eventually signed a security agreement establishing a payment plan. CC&T paid off its debt to Wirtgen over the next year or so, but again fell into financial trouble and entered into another security agreement and payment plan in 2004.

Despite its financial troubles, CC&T won a top sales award from Wirtgen for achieving the highest sales for the milling machine product line in 2003. The same year, CC&T was awarded Wirtgen's Eagle Award, which was awarded to a Wirtgen distributor

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[4] The trial court and the parties refer to this draft, at various times, as "the 2002 Agreement." For ease of reference, we shall likewise do so; however, a central issue in this appeal is whether the document referenced was an agreement between the parties.

[5] Mr. Chenet initially filed an affidavit with the complaint stating that he "duly executed the standard contract (the "2002 Agreement") and sent it back to Wirtgen." Mr. Chenet later submitted a supplemental affidavit wherein he stated that, "[u]pon further reflection . . . I signed the 2002 Dealer Agreement and placed it in a file at CC&T . . . in late 2005 or early 2006."

of all three product lines, milling machines, rollers and pavers, with the highest "total dollars produced." Mr. Murray testified that CC&T won that award in 2003 because CC&T had sold an "astronomical amount" of milling machines, which skewed their total dollar sales because milling machines carry the highest sales price of all three product lines. Mr. Murray explained that "even though [CC&T] had some pavers and rollers sales, the majority of their dollar volume was generated through milling machines."

In March 2004, Wirtgen notified CC&T in a letter that "CC&T will not be supported in representing the five counties of the Philadelphia market area for the Hamm Compactor product line of Wirtgen America." The following year, Wirtgen did the same with respect to the Vogele product line. Following Wirtgen's action on the Vogele product line, Mr. Chenet at CC&T wrote a letter to Mr. Murray at Wirgten expressing disappointment with Wirtgen's actions with respect to both the Hamm and Vogele product lines. To give CC&T assurance that "Wirtgen America views CC&T as a long term partner," Mr. Chenet's letter asked that Wirtgen increase CC&T's geographic area of responsibility and give CC&T "a long-term contract" for the Wirtgen milling machine line of products. Wirtgen did not respond to Mr. Chenet's letter and there is no evidence that Wirtgen did either of the things CC&T requested.[6]

In 2007, Wirtgen was approached by a prominent distributor, Binder Machinery, seeking to become a Wirtgen distributor in New Jersey; Binder had recently been released from its distributor agreement with one of Wirtgen's competitors because of consolidation in the industry. Wirtgen began negotiations to authorize Binder to sell Wirtgen products in New Jersey. CC&T heard about the discussions and communicated its displeasure to Wirtgen. Wirtgen encouraged CC&T to talk to Binder about being purchased by Binder. CC&T began discussions with Binder about an acquisition and sent its financial documents to Binder for review on June 2, 2007; negotiations, however, did not go any further between CC&T and Binder.

Wirtgen sent CC&T two letters in early June related to Wirtgen's proposed changes in CC&T's territory. The first, sent on June 4, stated that it was to serve as formal notice that Wirtgen planned to remove New Jersey from CC&T's territory, but leave CC&T's other territory in Pennsylvania and Delaware unchanged; it referenced the June 1988 Sales and Service Agreement as authority for Wirtgen's decision to change CC&T's "area of primary responsibility." The second letter, sent on June 12, also referred to the 1988 Sales and Service Agreement and explained as follows:

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[6] As pointed out by CC&T, Wirtgen allowed its sales representatives to continue to support CC&T for the Vogele and Hamm product lines in its Delaware and New Jersey territories despite having withdrawn sales support of those product lines in the Philadelphia market area.

> As I mentioned to you when we spoke on June 5, 2007, Wirtgen America, Inc. would like to amend the Sales and Service Agreement to eliminate New Jersey from CC&T's territory. . . . As you consider this request, please bear in mind that the Sales and Service Agreement entitles either party to terminate the Agreement upon written notice without cause. While not Wirtgen's preference, unless we are able to reach an agreement as set forth above, Wirtgen would invoke its right to terminate the Agreement.

On June 13 and 14, CC&T sent letters to all owners of Wirtgen products in New Jersey informing them that effective in August, CC&T would no longer be an authorized dealer for Wirtgen in New Jersey because Wirtgen decided to replace CC&T in the state. According to the testimony of Mr. Murray, Wirtgen had not yet established an effective date for the change from CC&T to Binder in New Jersey; Wirtgen was surprised to learn of the letters sent by CC&T and unhappy that the letters caused confusion and panic among some customers. Wirtgen subsequently sped up its negotiations with Binder and worked to address customer concerns.

Despite being unhappy with the way CC&T dealt with the letters to customers, negotiations between Wirtgen and CC&T continued in an attempt to resolve CC&T's concerns about the changes to its authorized territory. On July 10 and 11, Wirtgen executive Jim McEvoy sent Mr. Chenet two emails that outlined Wirtgen's position. In the emails, Mr. McEvoy explained that Wirtgen would allow CC&T to continue to sell Wirtgen and Vogele products in CC&T's existing territory in Pennsylvania and Delaware and that in exchange for the lost territory in New Jersey Wirtgen would authorize CC&T to sell all three product lines in seven additional counties in Pennsylvania. There is no evidence that Mr. Chenet responded to Mr. McEvoy's emails or that negotiations continued any further.

On September 21, CC&T filed a complaint seeking a "temporary injunction"[7] to prevent Wirtgen from terminating their relationship and a declaratory judgment that Wirtgen's actions constituted de facto termination of the parties' dealer agreement and that such action violated the Dealer Protection Statute, Tenn. Code Ann. § 47-25-1302.[8] On

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[7] CC&T sought injunctive relief in its complaint and subsequently filed a motion for "temporary injunction." The trial court set a hearing date and Wirtgen responded. Following a hearing, the trial court enjoined Wirtgen from terminating its dealer relationship with CC&T or otherwise reducing CC&T's territory and from refusing to deal with CC&T within the territory in which CC&T was currently operating as a Wirtgen dealer pending trial.

[8] Tenn. Code Ann. § 47-25-1302, which was enacted in 1999, provides in pertinent part, "No supplier, directly or through an officer, agent or employee, may terminate, cancel, fail to renew or (continued...)

October 18, Wirtgen sent CC&T a letter entitled "Nonexclusive Distributor Agreement" clarifying that, "if not previously exercised, Wirtgen hereby exercises its right to terminate the Agreement pursuant to paragraph 16(A) immediately after 90 days from your receipt of this letter."

Following a bench trial, the court found that the controlling agreement between the parties was the 1992 Agreement and that, because Tennessee law permitted Wirtgen to exercise its right under the 1992 Agreement to terminate CC&T without cause when the 1992 Agreement was entered into, it would be an unconstitutional impairment of Wirtgen's contractual rights to apply the current Tenn. Code Ann. § 47-25-1301 *et seq.*, which was amended in 1999, to the 1992 Agreement. The trial court dismissed the case.

CC&T appeals, contending that the trial court erred in finding that the 1992 Agreement had not been modified or superceded by the parties' oral agreement and course of dealing after 1999.

I. Standard of Review

Because this case was tried without a jury, our review of the trial court's findings of fact is *de novo*, accompanied by a presumption of correctness, unless the preponderance of the evidence is otherwise. *See* Tenn. R. App. P. 13(d). Our review of the trial court's determinations regarding questions of law is *de novo* with no presumption of correctness. *See Staples v. CBL Associates, Inc.,* 15 S.W.3d 83, 88 (Tenn. 2000); *Bain v. Wells*, 936 S.W.2d 618, 622 (Tenn. 1997).

II. Discussion

Under current Tennessee law, suppliers of construction equipment are prohibited from terminating, cancelling, failing to renew or substantially changing the competitive circumstances of a retail agreement without good cause. Tenn. Code Ann. § 47-25-1302 (West 2010). Prior to 1999, however, the law contained no such prohibition; it merely required that suppliers repurchase obsolete inventory when a "franchise agreement" was terminated. *See* Tenn. Code Ann. §§ 47-25-1301 and 1302 (West 1998). The 1999 amendments, specifically made retrospective,[9] also eliminated the law's narrow focus on

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[8](...continued)
substantially change the competitive circumstances of a retail agreement without good cause." Tenn. Code Ann. § 47-25-1302(a) (West 2009).

[9] Tenn. Code Ann. § 47-25-1312 provides:

(continued...)

suppliers and retailers of farm equipment to also include a supplier or retailer of "construction, utility and industrial equipment, outdoor power equipment, attachments or repair parts." Tenn. Code Ann. § 47-25-1301 (West 2010); *see Middle Tenn. Assocs., Inc. v. Leeville Motors, Inc.*, 803 S.W.2d 206, 209 (Tenn. 1991); *Jack Tyler Engineering Co., Inc. v. SPX Corp.*, 294 F.App'x 176, 178 (6th Cir. Sept. 15, 2008) (unpublished).

Since 1999, several cases before the U.S. Court of Appeals for the Sixth Circuit have challenged the retrospective application of Tenn. Code Ann. §§ 47-25-1301 *et seq*. While there are no Tennessee cases on point, the Sixth Circuit found that applying the statute retrospectively violates both the Tennessee and U.S. Constitutions. *See Jack Tyler Engineering Co., Inc.*, 294 F.App'x at 179 (holding that application of Tenn. Code Ann. §§ 47-25-1301 *et seq.* to a contract entered into in 1993 violated the Contracts Clause of the Tennessee Constitution); *Cummings, McGowan & West, Inc. v. Wirtgen America, Inc.*, 160 F.App'x 458, 462 (6th Cir. 2005) (unpublished) (holding that retroactive application of Tenn. Code Ann. § 47-25-1302 violated the Contracts Clause of the Tennessee Constitution); *Rutherford Farmers Coop. v. MTD Consumer Group, Inc.*, 124 F.App'x 918, 921 (6th Cir. Jan. 13, 2005) (unpublished) (holding that the retroactive provision of Tenn. Code Ann. § 47-25-1312 as applied to a 1989 retail contract for non-farm equipment violated the Contract Clause of the U.S. Constitution).

Article I, Section 20 of the Tennessee Constitution provides that "no retrospective law, or law impairing the obligations of contracts, shall be made." Tenn. Const. Art. I, § 20. This provision has been construed as prohibiting laws that "take away or impair vested rights acquired under existing laws or create a new obligation, impose a new duty, or attach a new disability in respect of transactions or considerations already passed." *Morris v. Gross*, 572 S.W.2d 902, 907 (Tenn. 1978); *see also Hamilton County v. Gerlach*, 176 Tenn. 288, 140 S.W.2d 1084, 1085 (1940). Whether a vested right has been impaired by a retrospective statute is determined by the consideration of the following factors, with no one factor being dispostive: (1) whether the public interest is advanced or impeded; (2) the extent to which the retroactive provision gives effect to or defeats the reasonable expectations of affected persons; (3) whether the statute comes as a surprise to persons who have long relied on a contrary state law; and (4) whether the statue appears to be procedural or remedial. *Doe v. Sundquist*, 2 S.W.3d 919, 923-24 (Tenn. 1999).[10]

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[9](...continued)
The provisions of this part shall apply to all contracts and shall apply to all retail agreements in effect which have no expiration date and are a continuing contract, and shall apply to all other contracts entered into, amended, extended, ratified or renewed after May 16, 1977.

[10] In 2004, the Tennessee Supreme Court added a fifth consideration – whether the right impaired (continued...)

CC&T concedes that the current version of the Dealer Protection Act cannot be applied to contracts entered into prior to 1999, because such application would violate Article I, Section 20 of the Tennessee Constitution. No Tennessee case has addressed this issue and the record shows that Wirtgen gave notice to the Tennessee Attorney General of its intent to challenge the constitutionality of Tenn. Code Ann. §§ 47-25-1301 *et seq.,* as written and applied; the Attorney General declined to intervene to defend the constitutionality of the statute.[11]

To the extent presented to this court for resolution, we agree with the rationale and holdings of the cases by the Sixth Circuit finding that the retrospective application of Tenn. Code Ann. §§ 47-25-1301, *et seq.,* could violate Article 1, Section 20 of the Tennessee Constitution to the extent that contractual rights have vested and the contract has not been substantially altered since July 1, 1999.[12]

This case, therefore, depends on whether the 1992 Agreement was the operative agreement between the parties in 2007 when this dispute arose. The trial court found that it was and, as a result, application of Tenn. Code Ann. § 47-25-1302 to that contract would violate the Contracts Clause of the Tennessee Constitution.

CC&T does not dispute that the last written agreement signed by both parties was the 1992 Agreement; however, it contends that the trial court erred in concluding that the 1992 Agreement was not superceded or at least amended by the parties' conduct after 1999.

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[10](...continued)
is a fundamental one – in *In re D.A.H.*, 142 S.W.3d 267, 274 (Tenn. 2004), which is not applicable in the present case.

[11] The Attorney General filed a response to Wirtgen's notice, explaining that "the Attorney General is of the opinion that Tenn. Code Ann. §§ 47-25-1301 *et seq.*, as written, is unconstitutional as an improper impairment of contract rights in violation of Article 1, Section 20 of the Tennessee Constitution because Tenn. Code Ann. § 47-25-1312 directs that Tenn. Code Ann. §§ 47-25-1301 *et seq.*, as amended in 1999, be applied to pre-existing contracts."

[12] The Sixth Circuit examined the same statutory prohibition at issue here in a case involving a similar contract between Wirtgen and another one of its distributors. *See Cummings, McGowan & West, Inc.*, 160 F.App'x 458. The *Cummings* court addressed the four factor analysis and concluded that while the first factor – whether the public interest is advanced or impeded – arguably advanced the public interest by improving the bargaining power of retailers, the court found the remaining factors militated against applying the amended law to an earlier contract. *Id.* at 461. The *Cummings* court, as well as the court in *Jack Tyler Engineering Co., Inc. v. SPX Corp*. based on the same reasoning, concluded that the retrospective application of Tenn. Code Ann. § 47-25-1302 impermissibly impaired the contractual rights of the parties. *Cummings, McGowan & West, Inc.*, 160 F.App'x at 462; *Jack Tyler Engineering Co., Inc.*, 294 F.App'x at 180. We agree with the Sixth Circuit's reasoning in both cases.

CC&T contends that the parties entered into an oral agreement in 2001 that was later memorialized in the unsigned written agreement sent to CC&T in 2002. CC&T also contends that the parties' conduct after 2001 and 2002 conformed to those agreements such that a new contract was formed. Alternatively, CC&T contends that the parties' conduct after 1999 amended the 1992 Agreement such that Tenn. Code Ann. § 47-25-1302 should be applied to that Agreement.

A. Existence of a new contract after 1999

In Tennessee, a contract can be express or implied and either written or oral, but regardless, an enforceable contract "must result from a meeting of the minds of the parties in mutual assent to terms, must be based upon sufficient consideration, must be free from fraud or undue influence, not against public policy and sufficiently definite to be enforced." *Moody Realty Co., Inc. v. Huestis*, 237 S.W.3d 666, 674 (Tenn. CT. App. 2007) (quoting *Staubach Retail Servs.-Southeast, LLC v. H.G. Hill Realty Co.*, 160 S.W.3d 521, 524 (Tenn. 2005) (citations omitted); *see Thompson v. Hensley*, 136 S.W.3d 925, 929-30 (Tenn. Ct. App. 2003). "A contract must be of sufficient explicitness so that a court can perceive what are the respective obligations of the parties." *Doe v. HCA Health Servs. of Tenn., Inc.*, 46 S.W.3d 191, 196 (Tenn. 2001). Issues relating to contract formation are questions of law. *Murray v. Tenn. Farmers Assurance Co.*, No. M2008-00115-COA-R3-CV, 2008 WL 3452410, at *2 (Tenn. Ct. App. Aug. 12, 2008).

CC&T contends that the parties entered into an oral agreement in 2001, whereby Wirtgen authorized CC&T to sell Wirtgen's new product lines of pavers and rollers. CC&T further contends that this alleged oral agreement was memorialized in the unsigned Distributor Sales and Service Agreement sent to CC&T attached to a letter in February 2002 (the "2002 Agreement"). CC&T asserts that this "2002 Agreement" is the operative contract between the parties because, despite the fact that neither party signed this agreement, the parties demonstrated their consent to be bound by its terms through their course of dealing thereafter.

i. Oral Agreement

The trial court found that the parties did not enter into a new oral contract in 2001. CC&T asserts that the trial court ignored undisputed testimony that the parties had an oral agreement.

Our review of the trial court's findings do not show that the court ignored the testimony regarding an oral agreement in 2001; to the contrary, the court found that the

testimony showed that the parties' arrangement was "casual" and did not rise to the level of a contract. The trial court found:

> The Court accepts the testimony of Mr. Murray that the plaintiff requested the added counties and the opportunity to sell two new product lines. Wirtgen did not oppose these efforts by the plaintiff. Wirtgen recognized the plaintiff was selling the new products, but Wirtgen did not formally require the changes. The Court finds this arrangement was rather casual, and that the plaintiff was hopeful it could prove itself to Wirtgen.

CC&T does not point to any evidence that preponderates against the trial court's finding and our review of the record confirms the finding. Moreover, we do not find any evidence in the record demonstrating that the parties' discussions around allowing CC&T to sell the pavers and rollers were sufficiently definite to be enforceable. *See Moody*, 237 S.W.3d at 674 (contract must be sufficiently definite to be enforced); *Doe*, 46 S.W.3d at 196 ("The terms of the contract are sufficiently definite if they provide a basis for determining whether a breach has occurred and for giving an appropriate remedy."). To the contrary, Mr. Murray's testimony, as accepted by the trial court, explained that CC&T was only permitted to attempt to make sales of rollers and pavers at its own risk; it was not under any obligation to "use its best efforts to actively promote and solicit sales and rentals" of rollers and pavers the way it was required to do with milling machines under the 1992 Agreement. Consequently, we do not find that a new contract was formed as a result of the parties' oral communications or actions in 2001.

ii. Written Agreement

The trial court also found that no new written contract was formed in 2002. The basis for the trial court's conclusion was that neither party signed the agreement attached to a February 2002 letter (the "2002 Agreement") and after February 2002, the parties continued to operate under the broad outline of the 1992 Agreement rather than conforming their conduct to the "2002 Agreement."

CC&T contends that the trial court "wrongly held no binding contracts were formed after the 1992 Agreement, based primarily on the absence of signatures on the 2002 Agreement." We disagree with CC&T's characterization of the significance the trial court placed on the signatures, or lack thereof, on the "2002 Agreement." With respect to the events around the February 2002 letter, the trial court found when Mr. Chenet received the February 2002 cover letter with a blank, unsigned Distributor Sales and Service Agreement, he did not sign it or return it to Wirtgen. Our review of the trial court's findings, however, do not show that this was the sole factor considered by the trial court in finding that the

parties did not intend to be bound by the "2002 Agreement." We find that the court correctly looked at the entire scope of the parties' dealings to determine whether the parties intended to be bound by the terms of the "2002 Agreement." *See APCO Amusement Co. v. Wilkins Family Restaurant of America, Inc.*, 673 S.W.2d 523, 527 (Tenn. Ct. App. 1984) (explaining that "the existence of a contract, the meeting of the minds, the intention to assume an obligation, and the understanding are to be determined in case of doubt not alone from the words used, but also the situation, acts, and the conduct of the parties, and the attendant circumstances").

The trial court found:

> [T]he Court finds the plaintiff did not consider the products and territory changes to be static or rigid. If the plaintiff had thought or intended differently, the plaintiff would have placed more importance on the formal documents, that is the 2002 contract.
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> . . .
>
> There's other proof, this is a matter of fact, the 1992 contract was in place, not the 2002 agreement, and that the plaintiff considered and thought that probably the 1992 contract was in place.
>
> The plaintiff knew that Wirtgen had the power to move some things around as the 1992 contract would allow ultimately. Trial Exhibits 20 and 21 reflect that Wirtgen removed the Hamm product from the plaintiff in the Philadelphia market. The following year Wirtgen removed the Vogele product from the same Pennsylvania area. The plaintiff complained about the reduction, was concerned about the reduction but never referred to any contract or contract rights.
>
> The reasonable onlooker must understand that the plaintiff could not rely upon the 2002 agreement, and did not do so in its dealings with Wirtgen.
>
> . . .
>
> Wirtgen, in future correspondence, never referred to the 2002 terms or the 2002 agreement, always using terms from the 1992 agreement or even referring to the 1988 agreement.
>
> The most pointed evidence that Wirtgen intended the contract, the 1992 contract to be in force was a letter from Wirtgen to Mr. Chenet, the plaintiff, dated in mid April 2002 only a few months after the 2002 written contract was sent to the plaintiff for its review.

CC&T asserts that these facts actually demonstrate that the parties' course of conduct between 2002 and 2007 show CC&T and Wirtgen assented to the terms of the "2002 Agreement" and, further, that the trial court overlooked certain other facts supporting this

contention. CC&T asserts that, contrary to the trial court's finding, Wirtgen's appointment of another distributor for the Hamm and Vogele product lines in the Philadelphia market area in 2004 and 2005 demonstrates that Wirtgen was acting under the "2002 Agreement" because such action is permitted under that agreement, while it is prohibited by the 1992 Agreement unless CC&T was in default, which CC&T contends it was not.

We disagree with CC&T and find that Wirtgen's actions in 2004 and 2005 with respect to these products lines were consistent with the fact that Wirtgen did not contractually obligate CC&T to sell Hamm and Vogele product lines, but merely permitted CC&T to try to prove that it was capable of selling those product lines. Wirtgen was, therefore, free to appoint a contractually authorized distributor in the same or similar area where CC&T was selling these products. We also note that in 2004, CC&T was under a payment plan to repay debt it owed to Wirtgen. Moreover, CC&T's actions in response to Wirtgen discontinuing "support" was also consistent with the casual relationship between the parties with respect to these two product lines. The letter from Mr. Chenet to Mr. Murray in December 2005, is the most pointed evidence supporting the fact that neither CC&T nor Wirtgen believed the "2002 Agreement" was operative. In the letter, Mr. Chenet asked Wirtgen for "an increase in our Geographic area of responsibility for the Wirtgen Milling Machine line" and "a long-term contract for this line." If CC&T believed, as it contends now, that the "2002 Agreement" was operative, Mr. Chenet would not have needed to ask for these two things in December 2005.

CC&T also contends that, in concluding no new contract was formed by the "2002 Agreement," the trial court ignored the testimony of Mr. Chenet that, after Wirtgen agreed to allow CC&T to sell its new product lines of rollers and pavers, CC&T terminated a dealer agreement with a manufacturer of a competing line of rollers and made substantial investments such as hiring and training technicians to service and repair the new product lines, purchasing and stocking parts for the new product lines and purchasing the pavers and rollers for its inventory and to demonstrate to customers. Further, CC&T contends that the trial court ignored evidence that, after CC&T began selling rollers and pavers, Wirtgen provided advertising support as well as support from Wirtgen district sales managers for the additional product lines, Wirtgen listed CC&T as a "Three Amigos Dealer" in the 2003 Wirtgen Dealer Directory and awarded CC&T the Eagle award in 2004, an award reserved for dealers of all three product lines. While the trial court did not specifically address these facts, we do not find that these facts are contrary to the other findings of the trial court.

Finally, CC&T asserts that the 1992 Agreement could not have been the operative agreement between the parties after 2001 because it was "not broad enough to contemplate, much less govern, the parties post-2001 course of dealings." To support this argument, CC&T relies principally on the fact that at the time the 1992 Agreement was signed the only

products manufactured by Wirtgen were milling machines. Consequently, CC&T contends, the 1992 Agreement "did not contemplate the distribution by CC&T of pavers and rollers supplied by Wirtgen." CC&T contends that, because Wirtgen dramatically changed its business model and distribution network in 2001 and 2002 in response to acquiring these new product lines and, as a result, the parties' relationship materially changed, the scope of the 1992 Agreement was too limited to control the parties' relationship.

We do not find the evidence supports CC&T's contention. While we recognize that between 1999 and 2001 Wirtgen acquired two new product lines and adjusted its distribution network to supply these additional products, we do not find that Wirtgen so dramatically changed its business model or the way in which it did business with CC&T that the 1992 Agreement no longer covered the nature and scope of the parties' relationship. Under the 1992 Agreement, Wirtgen manufactured road construction machinery that CC&T purchased from Wirtgen to either resell or to rent to its customers; CC&T would also stock parts for and provide service to the machinery sold or rented to its customers. This basic framework of rights and obligations between the parties did not change and while Wirtgen added additional types of road construction products to its repertoire over time, CC&T was largely able to sell these new products to its existing customer base for milling machines. Consequently, we do not find that the evidence preponderates against the trial court's findings of fact with respect to whether the parties operated under the "broad outline" of the 1992 Agreement.

Based on the foregoing, we do not find that the trial court erred in finding that the parties did not form a new contract, oral or written, after 1999. We will next examine CC&T's contention that the 1992 Agreement, while not superceded, was amended by the parties conduct between 2001 and 2007.

B. Existence of amendment to the 1992 Agreement after 1999

CC&T contends that if the conduct of the parties between 2001 and 2007 do not demonstrate the parties' intent to enter into a new written agreement, then such conduct demonstrated that the parties at least intended to modify the 1992 Agreement.

"A modification to a contract is a change to one or more contract terms 'which introduces new elements into the details of the contract, or cancels some of them, but leaves the general purpose and effect of the contract undisturbed.'" *Interstate Marketing Corp. v. Equipment Servs., Inc.*, No. M2005-00208-COA-R3-CV, 2006 WL 1547867, at *4 (Tenn. Ct. App. Jun. 6, 2006) (quoting 17A C.J.S. Contracts § 407 (1999)). A modification creates a new contract, though the original contract remains in effect to the extent not altered by the modification agreement. *Johnston v. Cincinnati, N.O. & T.P. Ry. Co.*, 146 Tenn. 135, 240 S.W. 429, 439 (1922); *see Arcata Graphics Co. v. Heidelberg Harris, Inc.*, 874 S.W.2d 15

(Tenn. Ct. App. 1993). A party's agreement to a modification need not be express, but may be implied from a course of conduct; this is true even where the agreement expressly specifies, as in this case, that the parties may only modify the agreement in writing. *Galbreath v. Harris*, 811 S.W.2d 88, 91 (Tenn. Ct. App. 1991); *Cooperative Stores Co. v. United States Fid. & Guar. Co.*, 137 Tenn. 609, 195 S.W. 177, 180 (1917). Like any contract, however, a modification must result from mutual assent. *Interstate Marketing Corp.*, 2006 WL 1547867, at *4; *Cooperative Stores Co.,*195 S.W. at 180. Moreover, not every modification or amendment results in a new contract; accordingly, the issue is "whether the existing rights were significantly altered." *Id.* (quoting 17A C.J.S. Contracts at § 408).

The trial court did not specifically address the issue of modification of the 1992 Agreement beyond finding that CC&T "was allowed to serve as a dealer for all three lines of products, but no written contract modification or written change of territory or product was sought by either party." CC&T contends that the "the Oral Agreement, as memorialized by the 2002 Agreement, and the parties' post-2001 course of conduct" demonstrated the parties' agreement to modify the 1992 Agreement.

The evidence CC&T relies on to support its argument – that CC&T purchased pavers and rollers from Wirtgen, which it then sold in an expanded territory, and that Wirtgen assisted CC&T in making those sales – if considered in a vacuum, might show that the parties' agreed to modify the 1992 Agreement; however, there is countervailing evidence that clearly demonstrates that there was no mutual assent by the parties to modify or amend the 1992 Agreement. The trial court found as a matter of fact that "the changes in the products and the places were not significant to the plaintiff and were expected to be somewhat fluid, based upon the plaintiff's behavior around the 2002 papers[; additionally], Wirtgen did not deem these changes to be significant based on its conduct in allowing product and place changes without a new writing signed by all." As discussed above, the record supports the trial court's findings.

The totality of the record shows that while Wirtgen allowed CC&T to sell Wirtgen products in territories not covered by the 1992 Agreement, Wirtgen expressly stated in writing that it would not expand CC&T's contractual territory unless and until certain conditions were met and there was no evidence that the conditions were met. The record also shows that, with respect to the additional product lines, Wirtgen expressly told CC&T that any sales of the roller and paver product lines would be at CC&T's own risk. The record further shows that as late as 2005, CC&T did not believe the parties had any contractual relationship, much less one that had been amended to expand CC&T's product line and territory, as demonstrated by the letter from Mr. Chenet to Mr. Murray specifically asking Wirtgen to give CC&T a long-term contract for Wirtgen milling machines in the same

expanded territory that CC&T had asked to be contractually given in December 2000. Mr. Chenet's letter did not reference any previous contract nor did it ask for a contract for the roller and paver product lines. For these reasons, we do not find that the parties manifested mutual assent to modify the 1992 Agreement in 2001, 2002 or at any subsequent time through their course of dealings.

The cases cited by both parties in support of their respective arguments that the changes to products and geographic sales territories relate to whether such changes were "material" changes to or "significantly altered" the 1992 Agreement. Having found, however, that the parties did not manifest mutual assent to any agreement to modify the 1992 Agreement, we need not reach a determination of whether the changes CC&T contends modified the parties' Agreement were such material changes so as to have created a new contract between the parties. We conclude, therefore, that the parties did not, either in writing or by their conduct, modify the 1992 Agreement after 1999.

III. Conclusion

As aforestated, we have determined that the parties did not mutually assent to a new agreement in 2001, 2002 or at any subsequent time and that, therefore, the operative agreement between the parties was the 1992 Agreement. We further found that the 1992 Agreement was not modified or amended by mutual assent of the parties at any time after 1999. When the parties entered into their agreement in 1992, Tenn. Code Ann. §§ 47-25-1301 *et seq*. did not prohibit the parties from agreeing to terminate their contractual relationship without cause; in fact, the statute did not apply to the parties. To apply Tenn. Code Ann. § 47-25-1302 retrospectively to the parties' 1992 Agreement would improperly impair the parties' contractual rights in violation of Article 1, Section 20 of the Tennessee Constitution; consequently, we affirm the judgment of the trial court.

Costs of the appeal are assessed to Construction Crane & Tractor, Inc.

RICHARD H. DINKINS, JUDGE